Electra-Cal Contractors *and* International Brotherhood of Electrical Workers, Local 441, AFL–CIO. Case 21–CA–33342

June 23, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND ACOSTA

Upon a charge filed by the Union on May 26, 1999, an amended charge filed on September 23, 1999, and a second amended charge filed on October 15, 1999,[1] the General Counsel of the National Labor Relations Board issued a complaint on February 21, 2002, against Electra-Cal Contractors, the Respondent, alleging that it has violated Section 8(a)(1) and (3) of the National Labor Relations Act. Although properly served copies of the charge, as amended, and the complaint, the Respondent failed to file a timely answer.

On March 22, 2002, the General Counsel filed a Motion for Summary Judgment with the Board. On April 2, 2002, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent, on April 23, 2002, filed a response to the Board's Notice to Show Cause and included an answer to the complaint.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling On Motion For Summary Judgment

Section 102.20 and of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that, unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated March 13, 2002, notified the Respondent that, unless an answer was received by March 20, 2002, a Motion for Summary Judgment would be filed. Thereafter, the Respondent neither filed an answer to the complaint nor requested an extension of time to do so.

In its response to the Board's Notice to Show Cause, the Respondent argues that summary judgment is not warranted because: (1) there is no merit to the complaint allegations; (2) the Respondent had answered the allegations in the unfair labor practice charges in the course of the investigation; (3) the Respondent's September 22 and October 26, 1999 position statements to the Region during the investigation of the unfair labor practices charges effectively denied all of the complaint allegations and might be sufficient to constitute an answer to the complaint; (4) the Respondent erroneously assumed that, based on the Charging Party Union's March 11, 2002 letter requesting that the Region postpone the date for hearing, the hearing would be continued and it no longer had to file its answer by March 20, 2002; and (5) the Respondent has filed its answer with its response to the Notice to Show Cause, and no party has been prejudiced by its failure to comply with the Board's procedural requirements. For the following reasons, we find no merit to the Respondent's arguments.

Where respondents are represented by counsel. Absent good cause late answers will not defeat a Motion for Summary Judgment. *Galesburg Construction Co.*, 259 NLRB 722 (1981), enfd. 703 F.2d 571 (7th Cir. 1983); see also *Value Line Co.*, 281 NLRB 212 (1986). Nor will "good cause" be lightly found. For example, it is no excuse that a timely answer was not filed because respondent's counsel was delinquent,[2] extremely busy,[3] unfamiliar with the Board's documents,[4] or mistakenly believed that the Board matter related to a proceeding before another agency.[5] We likewise have found that "good cause" was not shown where the respondent's excuse was that it thought that the unfair labor practice charge had been withdrawn.[6]

Finally, the Board has held that statements of position that are filed by a respondent or its counsel in the precomplaint investigative stage of an unfair labor practice proceeding are insufficient to constitute answers to the complaint. *Unlimited Security, Inc.*, 338 NLRB No. 58, slip op. at 1 (2002); *Wheeler Mfg. Corp.*, 296 NLRB 6 (1989). That is because "[i]t is the complaint, not the charge, that specifically and formally gives notice of the matters that are potentially at issue . . . . It is, therefore, the answer to the complaint, not the earlier statement of position in response to the charge, that ultimately frames the issues in dispute, defines the scope, and thus sets the parameters of the case." *Central States Xpress*, 324

[1] Although specific reference to the second amended charge was inadvertently omitted from the complaint, the substance of that charge's allegations was included in the complaint. Also, a copy of the second amended charge was submitted by the General Counsel in support of the Motion for Summary Judgment.

[2] *Sherwood Coal Co.*, 252 NLRB 497 (1980).
[3] *American Gem Sprinkler Co.*, 316 NLRB 102, 103 (1995).
[4] *Duro Pleating*, 317 NLRB 614 (1995).
[5] *Clean & Shine*, 255 NLRB 1144 (1981).
[6] *International Total Services*, 303 NLRB 16 (1991).

NLRB 442, 443–444 (1997). We find that the Respondent, who was represented by counsel at all times, has failed to show good cause for not filing a timely answer. Here, the Respondent does not dispute that it received the complaint and the Region's March 13, 2002 letter. Despite the fact that the March 13 letter put the Respondent on notice that summary judgment would be sought if an answer was not filed by March 20, 2002, the Respondent did not respond with its answer until after the Board's Notice to Show Cause issued on April 2, 2002. And although the Respondent filed position statements in September and October 1999 in response to the unfair labor practice charge, those statements are insufficient to constitute an answer. See *Bricklayers Local 31*, 309 NLRB 970 (1992), enfd. 992 F.2d 1217 (6th Cir. 1993). Finally, we believe that the Respondent could not reasonably infer, from the Charging Party Union's March 11 letter requesting postponement of the hearing that: (1) the Region would necessarily grant that request; and (2) a postponement would obviate the Board's procedural requirements that it either file a timely answer to or request an extension of time for doing so. See Sections 102.20 and 102.22 of the Board's Rules and Regulations. Accordingly, we grant the General Counsel's Motion for Summary Judgment.

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a California corporation with an office and place of business located in Pocoima, California, has been engaged in the business of electrical contracting. During the 12-month period ending September 6, 1999, the Respondent purchased and received goods valued in excess of $50,000 directly from points located outside the State of California. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act.

Eugene Vanderford	President
Daningo Grijalva	Foreman

On about April 1 and 21, 1999, the Respondent terminated employees Clint Scrivner and Mike Kaspar, respectively, because they had joined, supported, or assisted the Union and engaged in concerted activities, and in order to discourage employees from engaging in such activities. On about April 19, 1999, the Respondent, through its president, Vanderford, in a telephone conversation, interrogated an employee applicant about that applicant's union affiliation.

On about April 1 and 21, 1999, the Respondent, by its foreman, Grijalva, informed employees that they were being terminated for their union affiliation. About April 9, 16, and 21, 1999, the Respondent, by Grijalva, informed employees that another employee had been terminated for his union affiliation. On April 9, 13, and 21, 1999, the Respondent, by Grijalva, interrogated employees regarding their union affiliation. About April 21, 1999, the Respondent, by Grijalva, threatened an employee with termination in retaliation for the employee's union activities and affiliation.

CONCLUSIONS OF LAW

1. By terminating or otherwise discriminating against employees Clint Scrivner and Mike Kaspar because of their union activities, the Respondent has violated Section 8(a)(3) and (1) of the Act.

2. By interrogating employees regarding their union activities, by threatening employees with termination in retaliation for their union activities, by informing employees that they were being terminated for their union affiliation, and by informing employees that another employee had been terminated for his union affiliation, the Respondent has interfered with, restrained, and coerced employees in the exercise of rights guaranteed them by Section 7 of the Act.

3. By the foregoing conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically having found that the Respondent has violated Section 8(a)(1) and (3) by discharging Clint Scrivner and Mike Kaspar, we shall order the Respondent to offer them full reinstatement to the positions they had or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. Further, the Respondent shall make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest

as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[7] The Respondent shall also be required to remove from its files any and all reference to the unlawful discharge of these individuals, and to notify them in writing that this has been done and that the discharges will not be used against them in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Electra-Cal Contractors, Pacoima, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating or otherwise discriminating against employees because they engaged in union or other protected concerted activities.

(b) Interrogating employees about their union activities or affiliation.

(c) Threatening employees with termination in retaliation for the employees' union activities or affiliation.

(d) Informing employees that they were being terminated for their union affiliation.

(e) Informing employees that another employee had been terminated for his union affiliation.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Clint Scrivner and Mike Kaspar immediate and full reinstatement to the same positions they had or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Clint Scrivner and Mike Kaspar whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any and all references to the unlawful termination of Clint Scrivner and Mike Kaspar and, within 3 days thereafter, notify them in writing that this has been done, and that the unlawful conduct will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form necessary to analyze the amount of backpay due under the terms of this Order.

(e) With 14 days after service by the Region, post at its facility in Pacoima, California, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 1999.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 23, 2003

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Robert J. Battista, Chairman

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Wilma B. Liebman, Member

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R. Alexander Acosta, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[7] In the complaint, the General Counsel seeks an order requiring the Respondent to reimburse employees Scrivner and Kaspar for any extra Federal and/or State income taxes that would or may result from the lump sum payment of a monetary award. We decline to order this relief at this time. We believe that the remedial question raised by the General Counsel should be resolved after full briefing by the affected parties. See *Kloepfers Floor Covering*, 330 NLRB 811 fn. 1 (2000). Because there has been no such briefing in this no answer case, and because this relief would require a change in Board law, see, e.g., *Hendrickson Bros.*, 272 NLRB 438, 440 (1985), enfd. 762 F.2d 990 (2d Cir. 1985), we decline to pass on the issue of whether the relief would have been granted if the matter had been fully briefed.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT terminate or otherwise discriminate against employees because they engaged in union or other protected concerted activities.

WE WILL NOT interrogate employees about their union activities or affiliation.

WE WILL NOT threaten employees with termination in retaliation for their union activities or affiliation.

WE WILL NOT inform employees that they were being terminated for their union affiliation.

WE WILL NOT inform employees that another employee had been terminated for his union affiliation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Clint Scrivner and Mike Kaspar immediate reinstatement to the same positions they had or, if those positions no longer exist, to substantially equivalent positions.

WE WILL make Clint Scrivner and Mike Kaspar whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL remove from our files any and all references to the unlawful terminations of Clint Scrivner and Mike Kaspar and WE WILL, within 3 days thereafter, notify them in writing that this has been done, and that the unlawful conduct will not be used against them in any way.

ELECTRA-CAL CONTRACTORS